

JUN 30 2015

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-14-1387-DTaKu
)
DAVID BRIAN FEE,) Bk. No. 11-14420-PC
)
Debtor.)
)
DAVID BRIAN FEE,)
)
Appellant,)
)
vs.) **M E M O R A N D U M**¹
)
JEREMY W. FAITH, Trustee;)
JPMORGAN CHASE BANK, N.A.;)
N&K INVESTMENTS,)
)
Appellees.)

Submitted Without Argument
on June 18, 2015

Filed - June 30, 2015

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Peter H. Carroll, Bankruptcy Judge, Presiding

Appearances: Appellant David Brian Fee on brief pro se; Meghann
Ahern Triplett of Margulies Faith, LLP on brief for
Appellee Jeremy W. Faith, Trustee; Anne Claire
Manalili of Levinson Arshonsky & Kurtz, LLP, on brief
for Appellee JPMorgan Chase Bank, N.A.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may have
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th
Cir. BAP Rule 8024-1.

1 Before: DUNN, TAYLOR, and KURTZ, Bankruptcy Judges.

2 David Brian Fee appealed two orders and a judgment entered in
3 his pending chapter 7² bankruptcy case and a related adversary
4 proceeding, including an interim award of attorneys fees ("Interim
5 Fee Order") to counsel for the chapter 7 trustee ("Trustee"). Our
6 motions panel entered an order limiting the scope of the appeal
7 ("Order Re: Scope of Appeal") to matters other than the Interim Fee
8 Order. Notwithstanding service of the Order Re: Scope of Appeal on
9 Mr. Fee, Mr. Fee addressed his arguments in both his Opening Brief
10 and his Reply Brief principally to his appeal of the Interim Fee
11 Order. For the reasons stated below, we AFFIRM the bankruptcy court
12 with respect to the issues within the scope of the appeal.

13 I. FACTUAL BACKGROUND

14 Mr. Fee acquired title to approximately 60 acres of real
15 property ("Property") in Ventura, California, which included an
16 improved parcel and an adjacent vacant lot, in June 2005. To fund
17 his acquisition of the Property, Mr. Fee obtained a loan ("Purchase
18 Money Loan") from Washington Mutual Bank, FA ("WaMu") in the amount
19 of \$1,420,000, secured by a deed of trust on the Property.

20 In June 2006, Mr. Fee refinanced the Purchase Money Loan with a
21 loan from WaMu ("Refinance Loan") in the amount of \$1,680,000, also
22 secured by a deed of trust on the Property ("First Refinance Trust
23

24 ² Unless specified otherwise, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
26 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 Deed"), which was recorded June 22, 2006.

2 Mr. Fee thereafter placed further encumbrances on the Property
3 as follow: July 11, 2006 deed of trust to secure his debt in the
4 amount of \$120,000 to Joseph Zebrowsky ("Zebrowsky Trust Deed"); and
5 November 2, 2006 deed of trust with an assignment of rents to secure
6 his debt in the amount of \$125,000 to N & K Investments ("N&K Trust
7 Deed").

8 In August 2007, Mr. Fee obtained a second refinance loan
9 ("Second Refinance Loan") from WaMu in the amount of \$1,900,000,
10 secured by a deed of trust ("Second Refinance Trust Deed"), which
11 was recorded on August 14, 2007. The proceeds of the Second
12 Refinance Loan were used to pay off the Refinance Loan secured by
13 the First Refinance Trust Deed and the debt secured by the Zebrowsky
14 Trust Deed. The N&K Trust Deed was subordinated by agreement to the
15 Second Refinance Trust Deed.

16 On October 25, 2007, N&K recorded its own second deed of trust
17 with an assignment of rents ("Second N&K Trust Deed") to secure Mr.
18 Fee's debt to N&K in the amount of \$175,000. Also on October 25,
19 2007, N&K recorded two requests for notice of delinquency under the
20 Second Refinance Trust Deed. On September 25, 2008, WaMu was closed
21 by the Office of Thrift Supervision, and the Federal Deposit
22 Insurance Corporation ("FDIC") was named receiver. Ultimately,
23 through an historic Purchase and Assumption Agreement executed on
24 the same date, JPMorgan Chase Bank, N.A. ("JPMC") succeeded to
25 WaMu's interest in the Second Refinance Trust Deed and its
26 underlying promissory note.

1 Mr. Fee filed a chapter 11 petition on September 16, 2011. On
2 October 4, 2012, the bankruptcy court entered its order ("Conversion
3 Order") converting Mr. Fee's bankruptcy case to a chapter 7 case.
4 Jeremy W. Faith was appointed as the Trustee on October 16, 2012.

5 On July 23, 2012, while Mr. Fee's bankruptcy case was still a
6 chapter 11 case, JPMC filed a motion for relief from the automatic
7 stay in order to foreclose on the Property. Mr. Fee opposed JPMC's
8 motion for relief from stay on the basis that JPMC lacked standing
9 to bring the motion. The bankruptcy court determined that JPMC had
10 standing pursuant to Cal. Com. Code § 3301(b)³ and entered an order
11 ("Stay Relief Order") on August 24, 2012, granting JPMC relief from
12 the automatic stay. Mr. Fee did not appeal the Stay Relief Order.

13 During the subsequent non-judicial foreclosure process, JPMC
14 discovered an error in the extensive legal description of the
15 Property in the Second Refinance Trust Deed. JPMC thereafter
16 commenced an adversary proceeding in Mr. Fee's chapter 7 bankruptcy
17 case on February 13, 2013, pursuant to which JPMC sought reformation
18 of the Second Refinance Trust Deed, declaratory relief, and the
19 imposition and foreclosure of an equitable lien against the Property
20 to the extent any of the defendants named in the complaint, the

21
22 ³ Cal. Com. Code § 3301(b) provides:

23 "Person entitled to enforce" an instrument means . . . a
24 nonholder in possession of the instrument who has the
25 rights of a holder A person may be a person
26 entitled to enforce the instrument even though the person
is not the owner of the instrument or is in wrongful
possession of the instrument.

1 Trustee, Mr. Fee, and N&K, received any benefit from the proceeds of
2 the Second Refinance Loan.

3 The Trustee filed an answer to the complaint, through which he
4 both denied JPMC's claims and asserted affirmative defenses. After
5 Mr. Fee and N&K failed to file timely responsive pleadings to the
6 complaint, the Clerk of the bankruptcy court entered their defaults
7 on April 23, 2013.

8 The initial Status Conference in the adversary proceeding was
9 held April 30, 2013. Despite the entry of default against him,
10 Mr. Fee appeared to advise the bankruptcy court that he would be
11 seeking counsel or otherwise taking action in response to the
12 complaint. He did neither. At a further status conference
13 ("Further Status Conference") held in the adversary proceeding on
14 March 25, 2014, Mr. Fee again appeared. When the bankruptcy court
15 pointed out to Mr. Fee that he had taken no action to set aside the
16 default that had been entered against him nearly a year before,
17 Mr. Fee stated that he was aware his default had been entered and
18 that he would file documents that same day that would address his
19 position in the matter.

20 Immediately after the Further Status Conference, Mr. Fee filed
21 his "Ex Parte Petition, Motion and Request for Hearing as an
22 Extraordinary Writ of Mandamus" ("Petition for Writ of Mandamus") in
23 the bankruptcy court, which the bankruptcy court denied by its order
24 entered April 29, 2014. In denying the Petition for Writ of
25 Mandamus, the bankruptcy court observed that although Mr. Fee never
26 specified what ruling he was seeking to challenge, he appeared to

1 suggest that the bankruptcy court had erred in determining at some
2 unspecified point that JPMC had standing to assert claims with
3 respect to the Property.⁴

4 At some point after the Further Status Conference, JPMC entered
5 into a settlement agreement with the Trustee and N&K, the terms of
6 which provided that JPMC would pay Mr. Fee's bankruptcy estate the
7 sum of \$65,000 in exchange for a stipulated judgment reforming the
8 Second Refinance Trust Deed in the manner requested in the
9 complaint, i.e., by correcting the legal description.

10 To facilitate resolution of the entire adversary proceeding in
11 light of the proposed settlement, on June 19, 2014, JPMC filed a
12 motion for entry of a default judgment against Mr. Fee. The
13 adversary proceeding docket reflects that JPMC was directed to
14 upload a form of judgment without the need to schedule a hearing.

15 On July 1, 2014, the Trustee filed his motion for an order
16 approving the settlement ("Compromise Motion"). A hearing was set
17 for July 29, 2014 for the bankruptcy court to consider the
18 Compromise Motion. Mr. Fee filed no response or objection to the
19 Compromise Motion. On July 28, 2014, the bankruptcy court issued
20 its tentative ruling ("Tentative Ruling"), which approved the
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22
23 ⁴ Mr. Fee filed in this appeal a Petition for Entry of Default
24 Judgment Against JPMC ("Petition for Judgment"), decision of which
25 the motions panel deferred to the merits panel. The pending
26 Petition for Judgment includes a request that the order denying the
Petition for Writ of Mandamus be reversed. We address disposition
of the Petition for Judgment in the opening paragraph of the
Discussion, infra.

1 settlement under the standards articulated by the Ninth Circuit in
2 Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610,
3 620 (9th Cir. 1988); and Martin v. Kane (In re A&C Props.), 784 F.2d
4 1377, 1381 (9th Cir. 1986). The Tentative Ruling advised parties
5 that based on the failure of any party to file a written opposition
6 to the Compromise Motion, no appearance was necessary at the
7 scheduled hearing. Nevertheless, Mr. Fee appeared at the hearing
8 scheduled on the Compromise Motion, at which time the bankruptcy
9 court advised Mr. Fee that no objection had been filed, with the
10 consequence that the bankruptcy court had granted the Compromise
11 Motion, and answered Mr. Fee's question regarding the time within
12 which he was required to file his appeal.⁵

13 On July 30, 2014, the bankruptcy court (1) entered an order
14 ("Compromise Order") in Mr. Fee's main bankruptcy case approving the
15 Compromise Motion, and (2) entered a judgment ("Judgment") in the

16
17 ⁵ Mr. Fee's presentation at the hearing began:

18 I am David Fee, the debtor. I am here to notify the Court
19 that this Court lacks the authority jurisdiction. I have
20 filed a petition in the U.S. - United States District
21 Court for satisfaction. I feel this Court is out of
22 order. The conduct of the U.S. Trustee is out of order.
23 He's given legal advice where he's not here to do so. He
24 told me not to hire an attorney on an adversary matter,
25 therefore I lost. He told me I don't stand a chance
against JPMorgan Chase, I'll never beat them, and he is
the U.S. Trustee defense and JPMorgan Chase will never be
found - defense [sic]. That's all I really want to say,
Your Honor, and I look for a fair trial in the United
States District Central Court.

26 Tr. of July 29, 2014 H'rng at 2:13-25.

1 adversary proceeding which included both a default judgment against
2 Mr. Fee and judgment with respect to the other parties consistent
3 with the terms of the settlement approved through the Compromise
4 Motion.

5 On August 11, 2014, Mr. Fee filed a timely notice of appeal
6 with respect to the Compromise Order and the Judgment.
7 The notice of appeal also purported to appeal from an "Order on
8 Application for Payment Of Interim Fees and/or Expenses" ("Interim
9 Fee Order"), which the bankruptcy court had entered on July 23,
10 2014. After giving Mr. Fee an opportunity to respond to its
11 proposed action, which he declined, our motions panel entered an
12 order ("Order Re: Scope of Appeal") limiting the scope of this
13 appeal to the Compromise Order and the Judgment on the basis that
14 the Interim Fee Order was interlocutory. Nevertheless, Mr. Fee
15 addressed most of his argument in both his opening brief and his
16 reply brief to the alleged error of the bankruptcy court in entering
17 the Interim Fee Order.

18 **II. JURISDICTION**

19 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
20 and 157(b) (2) (A), (K) and (O). We have jurisdiction under 28 U.S.C.
21 § 158.

22 **III. ISSUES**

23 Whether the bankruptcy court abused its discretion when it
24 granted the Compromise Motion.

25 Whether the bankruptcy court abused its discretion when it
26 entered the Judgment to give effect to the Compromise Motion.

1 **IV. STANDARDS OF REVIEW**

2 A bankruptcy court's decision to approve a compromise
3 settlement is reviewed for abuse of discretion. Martin v. Kane
4 (In re A & C Props.), 784 F.2d at 1380; Goodwin v. Mickey Thompson
5 Entertainment Group, Inc. (In re Mickey Thompson Entertainment
6 Group, Inc.), 292 B.R. 415, 420 (9th Cir. BAP 2003). A bankruptcy
7 court abuses its discretion if it applies an incorrect legal
8 standard or misapplies the correct legal standard, or if its fact
9 findings are illogical, implausible or without support from evidence
10 in the record. TrafficSchool.com v. Edriver Inc., 653 F.3d 820, 832
11 (9th Cir. 2011).

12 We may affirm the decision of the bankruptcy court on any basis
13 supported by the record. See ASARCO, LLC v. Union Pac. R. Co.,
14 765 F.3d 999, 1004 (9th Cir. 2014); Shanks v. Dressel, 540 F.3d
15 1082, 1086 (9th Cir. 2008).

16 **V. DISCUSSION**

17 As a preliminary procedural matter, we deny Mr. Fee's Petition
18 for Entry of Default Judgment ("Petition for Judgment") against
19 JPMC. In the Petition for Judgment, Mr. Fee requests extensive
20 relief, tantamount to proclaiming him victorious in the overall
21 litigation, on the ground that JPMC failed to timely file its
22 opening brief on appeal. However, JPMC timely requested, and was
23 granted ("Extension Order"), an extension of the deadline for filing
24 its brief. JPMC thereafter filed its brief timely within the terms
25 of the Extension Order. Thus, the foundation upon which Mr. Fee
26 bases the Petition for Judgment fails, with the result that it is

1 incapable of supporting any requested relief. Further, to the
2 extent Mr. Fee seeks relief through the Petition for Judgment from
3 the bankruptcy court's order denying his Petition for Writ of
4 Mandamus, we note only that Mr. Fee never filed an appeal from that
5 order so that it is not before us for review.

6 As a second preliminary matter, we deem it necessary in light
7 of both the Order Re: Scope of Appeal and the wide-ranging issues
8 raised in Mr. Fee's Opening Brief to state explicitly that the only
9 matters we are reviewing in this appeal are the Compromise Order and
10 the Judgment. To the extent Mr. Fee intends his opening brief as an
11 invitation to this Panel to review the Conversion Order, the Stay
12 Relief Order, or the Interim Fee Order, we decline.

13 A. The Bankruptcy Court Did Not Abuse Its Discretion When It
14 Granted the Compromise Motion and Entered the Compromise Order.

15 Rule 9019(a) authorized the bankruptcy court to approve the
16 Trustee's Compromise Motion "after notice and a hearing." "[A]fter
17 notice and a hearing" does not mean that a hearing must be held,
18 only that notice of the proposed compromise must be "reasonably
19 calculated, under all the circumstances, to apprise interested
20 parties of the pendency of the action and afford them an opportunity
21 to present their objections." Mullane v. Central Hanover Bank &
22 Trust Co., 339 U.S. 306, 314 (1950). The bankruptcy court made
23 findings in its Tentative Ruling that due process had been satisfied
24 to support ruling on the Compromise Motion without a hearing.

25 This motion to approve a compromise pursuant to [Rule]
26 9019 has been filed by the [Trustee] and set for hearing
on the notice required by [Local Rule] 9013-1(d)(2) and
other applicable rules. The failure of [Mr. Fee] and

1 parties in interest to file written opposition at least
2 14 days prior to the hearing as required by [Local Rule]
3 9013-1(f) is considered as consent to the granting of the
4 motion. [Local Rule] 9013-1(h). Cf. Ghazali v. Moran,
5 46 F.3d 52, 53 (9th Cir. 1995). Further, because the
6 court is granting the relief requested by the moving party
7 and for which a *prima facie* case has been established, an
8 actual hearing is not necessary. See Boone v. Burk
9 (In re Eliapo), 468 F.3d 592, 602 (9th Cir. 2006). Their
10 defaults are entered and the matter will be resolved
11 without oral argument [Local Rule] 9013-1(j) (3). **No**
12 **appearance is necessary.** (Emphasis in original.)

13 The bankruptcy court then identified the correct legal standard
14 for approving a compromise. Specifically, the bankruptcy court
15 articulated the factors in In re A & C Props.: (a) The probability
16 of success in the litigation; (b) the difficulties, if any, to be
17 encountered in the matter of collection; (c) the complexity of the
18 litigation involved, and the expense, inconvenience and delay
19 necessarily attending it; and (d) the paramount interest of the
20 creditors and a proper deference to their reasonable views in the
21 premises. It then made explicit findings in the Tentative Ruling
22 with respect to these factors:

23 Here, the compromise resolves a pending adversary
24 proceeding (Adv. No. 9:13-ap-01034-PC) initiated by
25 plaintiff [JPMC] against the bankruptcy estate. The
26 proposed settlement provides, in pertinent part, that
[JPMC] will pay \$65,000.00 to the estate. In return,
[Trustee] will permit entry of judgment against [the]
estate to reform the [Second Refinance Trust Deed] on
debtor's real property to include, *inter alia*, an accurate
legal description. Releases will be executed and all
remaining claims of the adversary complaint will be
dismissed without the need for further litigation. The
court agrees that the compromise is fair and equitable,
and in the best interest of the creditors and the estate.
The defenses asserted by the defendant may result in the
estate recovering nothing. The potential costs in
bringing this proceeding to trial may be high and the
potential recovery may be low. Therefore, it is in the

1 estate's and the creditors' best interest to approve the
2 compromise.

3 Based on the findings contained in the Tentative Ruling, it is
4 evident that the bankruptcy court applied the correct legal standard
5 in ruling on the Compromise Motion, and that its findings were not
6 "illogical, implausible or without support from evidence in the
7 record."

8 Nothing in Mr. Fee's arguments on appeal suggests a different
9 result is appropriate. The majority of the arguments Mr. Fee raised
10 in his Opening Brief are outside the scope of this appeal. The two
11 arguments that do relate to the Compromise Motion were waived
12 because Mr. Fee failed to raise them in the bankruptcy court in the
13 first instance.

14 Generally, we do not consider arguments not "properly raise[d]"
15 in the bankruptcy court. O'Rourke v. Seaboard Sur. Co. (In re E.R.
16 Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989); see also
17 In re Cybernetic Serv., Inc., 252 F.3d 1039, 1045 n.3 (9th Cir.
18 2001) (appellate court will not explore ramifications of argument
19 because it was not raised in the bankruptcy court and, therefore,
20 was waived); Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 984
21 (9th Cir. 2001) (stating that court will not consider issue raised
22 for first time on appeal absent exceptional circumstances);
23 Concrete Equip. Co., Inc. v. Fox (In re Vigil Bros. Constr., Inc.),
24 193 B.R. 513, 520 (9th Cir. BAP 1996). An argument is "properly
25 raised" if it was raised sufficiently for the trial court to make a
26 ruling. In re E.R. Fegert, Inc., 887 F.2d at 957. Notwithstanding

1 the general rule,

2 A reviewing court may consider an issue raised for the
3 first time on appeal if (1) there are exceptional
4 circumstances why the issue was not raised in the trial
5 court, (2) the new issue arises while the appeal is
6 pending because of a change in the law, or (3) the issue
presented is purely one of law and the opposing party will
suffer no prejudice as a result of the failure to raise
the issue in the trial court.

7 Franchise Tax Bd. v. Roberts (In re Roberts), 175 B.R. 339, 345 (9th
8 Cir. BAP 1994) (internal quotation marks omitted) (citing United
9 States v. Carlson, 900 F.2d 1346, 1349 (9th Cir. 1990)). None of
10 these conditions for considering an issue not raised in the
11 bankruptcy court are satisfied in the instant appeal.

12 In his Opening Brief, Mr. Fee asserted that the bankruptcy
13 court erred in approving the Compromise Motion because, as a factual
14 matter, WaMu had two weeks to examine the Second Refinance Trust
15 Deed before it was recorded. Further, JPMC, assuming it had
16 "standing," had more than ample time to compel Mr. Fee to execute a
17 replacement trust deed, but it never did.

18 We note that Mr. Fee never filed an opposition to the
19 Compromise Motion. While he did appear at the time the hearing on
20 the Compromise Motion had been scheduled, his only "argument" was to
21 assert the bankruptcy court had no authority over the matter.
22 Thus, Mr. Fee has waived the argument made to us, which appears to
23 be based on an estoppel theory, because he never presented it to the
24 bankruptcy court in the first instance. Further, Mr. Fee expressly
25 waived any issue regarding the bankruptcy court's lack of authority
26 over the Compromise Motion. Mr. Fee stated in his Opening Brief:

1 "The Bankruptcy Court had jurisdiction to enter the final Judgment
2 and Orders referenced above pursuant to 28 U.S.C. §§ 157(a),
3 157(b) (1) and 1334." Opening Brief at 1:15-17.

4 The only other argument Mr. Fee asserts in his Opening Brief
5 that relates even tangentially to the Compromise Motion is that the
6 bankruptcy court erred when it denied the Petition for Writ of
7 Mandamus. Mr. Fee asserts that in denying the Petition for Writ of
8 Mandamus the bankruptcy court improperly granted standing to JPMC to
9 which it was not entitled. Again, we note that Mr. Fee never
10 presented this argument in opposition to the Compromise Motion. Nor
11 did he appeal the order denying the Petition for Writ of Mandamus.
12 Mr. Fee therefore has waived this argument as well.

13 B. The Bankruptcy Court Did Not Abuse Its Discretion When It
14 Entered the Judgment.

15 Except to the extent the Judgment is a default judgment against
16 Mr. Fee, it constitutes a consent judgment as to the remaining
17 parties. We already have determined that the bankruptcy court did
18 not abuse its discretion when it approved the Compromise Motion.
19 The consent judgment is merely another iteration of the approval of
20 the Compromise Motion, the form being dictated by the existence of
21 the adversary proceeding. Accordingly, no additional issue exists
22 in this appeal in connection with the entry of the Judgment, as
23 distinct from the entry of the Compromise Motion.

24 **VI. CONCLUSION**

25 Mr. Fee did not oppose the Compromise Motion. Accordingly, he
26 waived for purposes of this appeal any issue he might otherwise have

1 had with respect to the entry of the Compromise Order or the
2 Judgment. We therefore AFFIRM.

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